08-1489-cr

To Be Argued By:
CHRISTOPHER W. SCHMEISSER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-1489-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DAVID M. SCOTT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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NORA R. DANNEHY
Acting United States Attorney
District of Connecticut

CHRISTOPHER W. SCHMEISSER
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

STATEMENT OF JURISDICTION

This is an appeal by David Scott from a restitution order entered in a criminal case in the United States District Court for the District of Connecticut (Alvin W. Thompson, U.S.D.J.). The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The restitution order that is the subject of appeal was entered on February 11, 2008. DA 5. On February 19, 2008, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). *Id.* This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1a. Did the district court abuse its discretion in awarding restitution based on the increased value of the property stolen – namely, mutual funds – as of the date of sentencing rather than the value on the date the assets were originally stolen by the defendant over a decade before?

1b. Did the defendant waive alternative ways of valuing the stolen assets by agreeing to the methodology adopted by the district court if the court awarded restitution greater than the original cash value of the stolen assets, as it did?

2. Did the district court commit reversible error by failing to issue the final restitution order within 90 days after sentencing as called for by the restitution statute, 18 U.S.C. § 3664(d)(5), where the defendant has acknowledged no prejudice was caused by the delay and established precedent in this Circuit holds that such delay is thereby harmless?

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Preliminary Statement

The defendant appeals the district court's criminal restitution order that followed the express language of the restitution statute, 18 U.S.C. § 3663A, and sought to make the victims whole by awarding restitution for the value of stolen property – a portfolio of mutual funds – as of the date of sentencing. The defendant argues, however, that the restitution statute provides no recovery to the victims for the lost increase in value of their stolen property over time. Moreover, the defendant claims that the restitution

order is void because it was not entered within 90 days of sentencing as called for by the statute, even though the defendant acknowledges that he has suffered no prejudice, and established precedent in this Circuit holds that such delay is thereby harmless. The government respectfully requests that this Court affirm the district court's order of restitution.

Statement of the Case

On February 12, 2007, the defendant waived his right to be prosecuted by indictment and pled guilty to a one-count information charging him with mail fraud, in violation of 18 U.S.C. § 1341, relating to the defendant's embezzlement of his clients' investment assets. *See* Defendant-Appellant's Appendix ("DA") 3.

On August 23, 2007, the district court (Alvin W. Thompson, U.S.D.J.) sentenced the defendant to a term of incarceration of 48 months with three years of supervised release and a special assessment of $100. DA 5. The court orally imposed a restitution order in the amount of the original cash value of the embezzled assets. DA 89. The court waived the fine and stated that a written restitution order would follow after additional briefing on whether investment gains would also be recoverable under the restitution statute. DA 88-89.

After additional briefing in September 2007, the district court on February 11, 2008, issued the final restitution order. DA 5. The defendant, through prior counsel Paul Thomas, Esq., filed a timely notice of appeal of the restitution order on February 19, 2008. *Id.* The defendant

is currently serving his sentence. He is represented on appeal by new counsel, Devin McLaughlin, Esq.

In this appeal the defendant challenges the district court's award of additional restitution that compensates the victims for the increase in the value of the property stolen (namely, mutual funds) that would have occurred from the dates of the original embezzlements, through the years of concealing the thefts, up to the date of his sentencing.

Statement of Facts and Proceedings Relevant to this Appeal

The defendant engaged in a scheme to embezzle property – namely, retirement investments in mutual funds – from two clients, his in-laws Elizabeth and Charles DellaCamera, to whom he was providing retirement advice. DA 22. The defendant was the President and Director of M & R Financial, Inc., a small investment advisory company he had incorporated in 1995. *Id.*

a. Establishing the relevant accounts

From the mid-1990s through May 2006, the defendant provided financial advice to Elizabeth and Charles DellaCamera regarding their retirement assets and assisted them in establishing a variable annuity contract and opening two IRAs. *Id.*

In 1993, Elizabeth DellaCamera, with the defendant's assistance, purchased a MassMutual tax-deferred annuity to be paid in a lump sum with assets from her father's

estate and a rollover from another retirement account. *Id.* The invested monies totaled $221,893, which were placed in various diversified equity investments. DA 22, 100-110, 137-38.

In 1997, Ms. DellaCamera, again with the defendant's assistance, opened an American Skandia IRA with rollover retirement funds of approximately $80,161, which were also placed in various diversified investments. DA 22, 121-25.

In 1997, Charles DellaCamera, with the defendant's assistance, opened an American Skandia IRA with rollover retirement funds of approximately $20,254, which were placed in various diversified investments. *Id.*

b. The defendant embezzles from the relevant accounts.

In June 1995, the defendant began embezzling from Ms. DellaCamera by selling certain investments and taking partial withdrawals from her MassMutual annuity, forging her signature on the standard surrender form, and requesting the surrender check be made payable to M & R Financial, the defendant's company. DA 22, 38. Using a similar approach, the defendant withdrew the balance of the account, with the stolen assets collectively totaling $290,913. DA 22, 100-110, 137-38.

In 1999, the defendant began to take withdrawals from Ms. DellaCamera's American Skandia IRA and thereafter made four additional withdrawals, culminating in February 2000, again forging her signature on surrender forms to

obtain the assets. DA 22. The total assets stolen by the defendant from this account totaled $90,198.62 as of the dates of the liquidation and withdrawals. DA 22, 121-25.

Similarly, in April 2000 through July 2000, the defendant made five withdrawals from Charles DellaCamera's American Skandia IRA account, forging his client's signature on the needed surrender forms and depleting the account, resulting in a loss valued at $25,511.36 as of the dates of the liquidations and withdrawals. *Id.*

c. The lulling conduct

During the period from 1997 through the Spring of 2006, the defendant issued to the DellaCameras fraudulent account statements purportedly from MassMutual and American Skandia, which misrepresented the actual investment balances of the relevant accounts. DA 22. The defendant created fictitious account representatives for both MassMutual and American Skandia, as well as email addresses in those representatives' names, which in fact were registered to the defendant. *Id.*

Though all the victims' investments had been stolen by the defendant by 2000, the fabricated account statements reflected that account balances remained. DA 22, 34 n.1. During the course of the scheme, the victims were led to believe that their investments remained secure as reflected in the various account statements. DA 22; Government's Supplemental Appendix ("GSA") 36-41. During the relevant time, the investments held by the accounts would have risen in value. DA 62, 100-130.

d. Guilty plea and sentencing memoranda on the issue of restitution

On August 23, 2007, the defendant pled guilty to one count of mail fraud relating to the above-described embezzlement and his efforts to avoid detection. DA 5. The defendant did not dispute that he had embezzled the assets in the amounts noted above or that he took steps to conceal his conduct through various lulling statements. DA 15.

On August 17, 2007, the government filed its sentencing memorandum, noting as to the issue of restitution that MassMutual had stepped into the shoes of Elizabeth DellaCamera because it had repaid her for the cash value of the assets originally stolen from the MassMutual account, namely $290,913. DA 38. The government also noted that she remained entitled to reimbursement for assets originally stolen from the American Skandia account in the amount of $90,199. *Id.* The government also noted that Charles DellaCamera was owed $25,511 for the assets originally embezzled by the defendant from his account. *Id.*

e. The sentencing of the defendant

The district court sentenced the defendant on August 23, 2007. DA 5. After considering the entire record, the court sentenced the defendant to a period of incarceration of 48 months and a three-year period of supervised release. DA 59. The court also ordered him to pay a special assessment of $100. DA 64.

At the sentencing, the district court considered the issue of appropriate restitution. The parties agreed that the original cash value of the assets embezzled by the defendant from Ms. DellaCamera totaled $290,913 from the MassMutual Account and $90,199 from the American Skandia account. DA 38, 47, 64-66. The parties agreed that MassMutual was a substitute victim entitled to at least $290,913, reflecting MassMutual's repayment of Elizabeth DellaCamera. DA 62. The parties further agreed that original cash value of the assets embezzled from Mr. DellaCamera totaled $25,511. DA 38, 64, 67.

MassMutual requested additional restitution to reflect the extent Ms DellaCamera's investments would have increased during the lengthy time after the defendant had liquidated the investments, stolen the monies, and covered up the thefts. DA 62-65, 100. MassMutual had previously reimbursed the victim for those losses as part of a civil settlement. DA 100.

The defendant did not contest that he had to repay the cash value of the original assets stolen or that priority in repayment should be given to the direct victims of the offense, rather than the substitute victim MassMutual. DA

21. The defendant did, however, request additional time to determine whether the court should also include in the restitution order an award of lost investment earnings. DA 60.

In light of the parties' agreement at sentencing as to the value of the original assets stolen, the district court ordered restitution of at least $290,913 to MassMutual, at least $90,198.62 to Elizabeth DellaCamera, and at least $25,511.36 to Charles DellaCamera. DA 89.

The court requested that the parties submit additional briefing concerning the open issue of whether additional restitution and/or prejudgment interest were appropriate. *Id.* The court waived the payment of a fine in light of the significant restitution obligation and the defendant's inability to repay a fine in addition to restitution. DA 88.

f. The parties' supplemental memoranda regarding restitution and lost investment returns

1. The government's submission

On September 11, 2007, the government filed a supplemental memorandum, with attachments, noting that the court could award as restitution additional monies to compensate for the lost investment gains from the date of the original thefts to the date of sentencing. DA 96. The government noted that MassMutual had calculated the total loss suffered by Ms. DellaCamera to be $471,962. This figure reflected the cash value of the original stolen monies plus $181,049.57, which approximated the return

that the victim would have earned had she held the property – the retirement assets – as intended. DA 97.

Alternatively, the government proposed that the value of the original assets stolen be augmented by a lost interest calculation, using the one-year treasury rate, to reflect the lost purchasing power or a conservative estimate of the lost opportunity cost caused by the passage of time from the dates of theft until the date of sentencing, a figure totaling $156,961. DA 98. The government noted that it was unclear whether the latter approximation better measured the loss to the victims. DA 99.

The government undertook a similar analysis of the impact on Ms. and Mr. DellaCamera caused by the defendant's embezzlement of their retirement investments held by American Skandia. DA 98.

The government explained that consistent with the MassMutual analysis, a representative at Prudential, which now serviced the American Skandia contracts, had calculated that the fair market value of the stolen investment assets from Ms. DellaCamera's account would have been $96,146 as of the date of sentencing had the investments remained in the account. That amount reflected lost investment returns of $5,947 on the $90,199 in assets initially liquidated and embezzled. DA 98. The analysis assumed the stolen assets would have been kept in the original investments and then switched into the equivalent Prudential Fund, when American Skandia was taken over by Prudential. *Id.*

Undertaking the same analysis on Mr. DellaCamera's account reflected that the Mr. DellaCamera would have lost $35 over the time period had his $25,511 remained invested in the same basket of retirement assets. DA 99.

The government also provided an alternate analysis using the one-year treasury rate, reflecting lost interest income over the equivalent time period of $26,334 as to Ms. DellaCamera's American Skandia account and $6,772 as to Mr. DellaCamera's account. DA 98-99. Because of the particular time period during which the stolen funds would have been invested in the American Skandia accounts, which involved initial equity market downturns, the interest rate return exceeded the investment return of the basket of retirement assets.

2. The defendant's supplemental submission

The defendant subsequently filed his supplemental memorandum contending that restitution neither could nor should be ordered for *any* amounts beyond the cash the defendant had originally stolen by liquidating the victims' mutual funds. DA 131. The defendant made this argument even though, because of the defendant's fraudulent lulling statements, most of the investment assets had been liquidated and stolen a decade before the victims discovered the embezzlement.

Alternatively, if the court found that restitution should be awarded to reflect losses from the passage of time, the defendant requested that the court use the lost investment gains to determine the additional restitution "as it best reflects the victims' losses." DA 133. Specifically, if

additional restitution applied, the defendant did not oppose total restitution payable to MassMutual of $471,962; $96,146 to Ms. DellaCamera; and $25,511 to Mr. DellaCamera. DA 134. The defendant plainly requested that the court adopt the lost investment gain methodology as these restitution figures in the aggregate were less than the total restitution applicable if the district court adopted the government's alternative treasury rate restitution calculation.

g. The district court's restitution order

While the district court had orally ordered some restitution amounts on the date of sentencing, the district court issued the written restitution order on February 11, 2008, which addressed the issue of whether to compensate the victims for investment gains they would have accrued had they held the assets as of the date of sentencing. DA 5. The district court held that "it is appropriate, under the circumstances of this case, to require the defendant to pay an amount for restitution that includes the victim's pre-judgment losses." DA 10. The court held that this amount was equal to "the greater of – (I) the value of the property on the date of the damage, loss or destruction; or (II) the value of the property on the date of sentencing . . . ." DA 10 (citing 18 U.S.C. § 3663A(b)(1)(B)).

The district court adopted virtually verbatim the restitution calculations proposed by the parties under the lost investment gains methodology. The district court ordered total restitution of $472,052.52 payable to

MassMutual;[1] $96,146 payable to Elizabeth DellaCamera; and $25,511 payable to Charles DellaCamera. DA 10.

This appeal followed.

SUMMARY OF ARGUMENT

The Mandatory Victims Restitution Act ("MVRA") requires the district court to order the defendant to pay the victim an amount equal to the *greater* of "(I) the value of the property on the date of the . . . loss; or (II) the value of the property on the date of sentencing . . . ." 18 U.S.C. § 3663A(b)(1)(B). The defendant is thus held accountable to the victim for any increases in the value of stolen property from the date of theft to sentencing and assumes the risk of any diminution in value during that same period.

Here the property stolen was mutual funds or other equity investments held in the victims' retirement accounts. The defendant has contended that the victims are entitled only to the cash value of those investments as of the date he surreptitiously liquidated the holdings and stole the funds. In applying the restitution statute, the district court determined that the victims were entitled to be reimbursed the original cash value of the stolen property as well as the gains that the property – the stolen mutual funds – would have accrued during the relevant

[1] This figure was $90 greater than the joint figure of $471,962 proposed by the parties in their supplemental submissions. The record does not explain this slight divergence from the parties' submission.

period prior to sentence. The court recognized that under the express terms of the restitution statute, the defendant must pay the *greater* of the value at the time of the original loss or the value at the date of sentencing. In this case, the stolen equity investments had increased in value by the sentencing date and thus drove the appropriate restitution calculation.

On appeal, the defendant now takes issue with the methodology adopted by the court to determine the extent that restitution exceeded the original cash value of the stolen investments. But to the extent the district court was correct to award *any* figure greater than the original cash value of the stolen investments, the defendant waived any challenge to the methodology adopted by the district court. In submissions before the trial court, the defendant told the court that, if any restitution "beyond the funds actually taken is authorized and appropriate under 18 U.S.C. § 3663A, the measure of lost investment gains (or losses) should be used to calculate additional restitution . . . ." DA 133. The defendant presumably adopted this position because, under the facts here, the investment returns on the stolen funds were lower than the return over the same period as reflected by the treasury bill rate. By advocating a particular methodology before the district court, the defendant cannot now complain that the district court complied with his request.

Finally, the district court did not commit reversible error by exceeding 90 days in issuing the restitution order. Under 18 U.S.C. § 3664(d)(5), if a victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the court may order restitution by a date "not

to exceed 90 days after sentencing." This Court has repeatedly held that any error caused by issuing the restitution order after 90 days is harmless unless a defendant can show actual prejudice. The 90-day rule is intended to benefit victims, not the defendant. No prejudice has resulted from the delay in this case, as the defendant has acknowledged, and thus any error is harmless. The defendant has noted that this Circuit's precedent precludes his argument and raises the argument simply to preserve it for any additional review.

ARGUMENT

I. The district court did not err by including in restitution the amount that the stolen property – namely, mutual funds – would have increased in value by the date of sentencing.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the above Statement of Facts.

B. Governing law and standard of review

1. Available restitution for stolen property

The Mandatory Victims' Restitution Act ("MVRA") instructs that "notwithstanding any other provision of law," a sentencing court shall order defendants convicted of certain crimes to make restitution to their victims. *See United States v. Boccagna*, 450 F.3d 107, 112 (2d Cir. 2006). For property-related crimes where return of the stolen property is "impossible, impracticable, or inadequate," the district court is to order the defendant to pay an amount equal to the *greater* of "(I) the value of the property on the date of the . . . loss; or (II) the value of the property on the date of sentencing . . . ." *Id.* (citing 18 U.S.C. § 3663A(b)(1)(B)).

In undertaking such restitution analysis, the threshold issue is to identify *what* "property" was stolen. *See Boccagna*, 450 F.3d at 114 ("the MVRA unambiguously tells a court *what* to value (the property lost . . .)"). The next step is to determine as of *when* to value that stolen property, which the MVRA makes clear is on the initial date of loss and on the date of sentencing. *Id.*

The final step is to determine *how* to value the stolen property on those dates. The MVRA is silent as to this last step, namely, the measure to be used by the court. In *Boccagna*, this Court concluded that determining "value" on the identified dates is a "flexible concept to be calculated by a district court by the measure that best serves Congress's statutory purpose . . . ." *Id.* at 115. That purpose "is to make victims of crime whole, to fully

compensate these victims for their losses and to restore these victims to their original state of well-being." *Id.* (internal quotation marks omitted). District courts are afforded "discretion . . . in determining the measure of value appropriate to [the] restitution calculation in a given case." *Id.* at 114. In most circumstances, the fair market value will be the measure most apt to serve the statutory purpose. *Id*. Fair market value "reflects the value of property's greatest economic use, [and thus] it generally provides the most reliable measure of both the full loss sustained by a victim when his property is damaged, lost, or destroyed, and the degree to which that loss is mitigated by recouped property." *Id.* at 115-16.

Reasonable valuation of loss at sentencing may differ based on the nature of the "property" involved. *See, e.g.*, *United States v. Barton*, 366 F.3d 1160, 1167 (10th Cir. 2004) (permitting costs of replanting a destroyed forest in an effort to repair the forest to its condition prior to the arson). *Cf. United States v. Milstein*, 481 F.3d 132, 136-37 (2d Cir. 2007) (defining "property" to include trademark rights, permitting lost sales/profits in an award for trademark infringement as part of the value of property the victim lost under the Victim and Witness Protection Act ("VWPA"), which has a provision virtually identical to 18 U.S.C. § 3663A(b)(1)(B)).

Focusing on the specific property stolen and its value at the date of sentencing allows the victims to replace the stolen property and thus "restore[s] [the] victim, to the extent money can do so, to the position he occupied before sustaining injury." *Boccagna*, 450 F.3d at 115.

2. Waiver

In the present case, the defendant has maintained that the only restitution appropriate as a matter of law was the original cash value of the stolen mutual funds, despite the fact that the funds increased in value between the theft and sentencing. The defendant requested, however, that, if the district court believed that restitution "beyond the funds actually taken is authorized and appropriate under 18 U.S.C. § 3663A, the measure of lost investment gains (or losses) should be used to calculate additional restitution . . . ." DA 133. When a defendant chooses for tactical reasons not to lodge an objection, he completely waives any claim of error on appeal. *See, e.g., United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver)*; United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007) (defendant soliciting certain result constitutes "true waiver"), *cert. denied*, 129 S.Ct. 252 (2008); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005) (deliberate choice to take a position constitutes waiver of challenging the position later); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) (If a party refrains from objecting as a "tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review"); *United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991) (holding that defendant waived his right to appeal a matter on which he withdrew his objection); *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) (holding that defendant waived his right to appeal an evidentiary claim because he welcomed such evidence at trial). The defendant made such a tactical choice when he agreed to the investment losses approach because he knew that the interest rate

approach would have resulted in a higher restitution award.

3. Standard of review

This Court typically reviews a MVRA order of restitution "deferentially" and will reverse only for abuse of discretion. *Boccagna*, 450 F.3d at 113. In assessing whether discretion has been abused, the Court determines whether the challenged ruling rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions. *Id.* Here the defendant does not challenge the mathematical calculations undertaken by the district court in awarding restitution. Instead, he challenges whether the district court erred in its legal conclusion that the restitution statute permitted an award greater than the original cash value of the stolen mutual funds. Thus, the defendant raises a question of law to be reviewed de novo.

C. Discussion

1. The stolen property was mutual funds – not cash – making investment gains appropriately included in a valuation of loss.

The defendant liquidated the victims' property – namely, mutual fund holdings held in retirement accounts and a variable annuity – without the victims' knowledge and then spent those monies. The district court property determined that return of the stolen property was "impossible, impracticable, or inadequate" and ordered the defendant to pay an amount equal to the *greater* of "(I) the value of the property on the date of the . . . loss; or (II) the value of the property on the date of sentencing . . . ." 18 U.S.C. § 3663A(b)(1)(B); DA 10.

Here, the "property" stolen was mutual funds. The district court correctly recognized that the cash-out value of the funds a decade or so before sentencing would not adequately compensate the victims for their lost property because the funds at issue had appreciated in value after the time of the original theft, albeit at a rate below the treasury bill rate. The district court property determined that the value of the funds on the date of sentencing should include some incremental increase from the original cash-out value of the funds and awarded the investment gains that the funds would have accrued from the time of the theft. *Id.*

The defendant's argument against the restitution award fails at the outset by incorrectly characterizing the

"property" stolen by the defendant. The defendant seeks to equate the *mutual funds* he stole with the cash the defendant ultimately removed from the account after he liquidated the victims' assets. Def. Brief. 8 ("the property is the money stolen, and the value of that property is the face value of the amount stolen."). Under the facts here, the defendant's illegal acts included the selling of the relevant mutual funds held in the victims' account without their knowledge and then removing the cash from the account. The victims throughout the fraud believed they still owned the mutual funds.

By incorrectly identifying the stolen property, the defendant unnecessarily complicates the restitution issue. In fact, he all but concedes that if the victims' stolen property were mutual funds – not cash – then the district court got the restitution calculation right. Def. Brief 20, 13 ("Restitution for a stolen widget *should* be the fair market value of the widget"; "[w]here the item stolen is a good, it may have a different fair market value on the date of sentencing than the date of the theft, *and the court must use the greater*") (emphasis added). Because the district court appropriately awarded restitution based on the higher value that the mutual funds would have attained by the date of sentencing, the district court did not err in its application of the restitution statute.[2]

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[2] The defendant does not contest that the victims' investments would have increased in value as they did, nor does he claim that the district court miscalculated the applicable returns as of the date of sentencing. Instead, he maintains that the increases in value over the original cash-out (continued...)

2. Even if, for the sake of argument, the stolen property were considered to be "cash," the district court did not legally err by including a rate of return under the restitution statute.

By failing at the outset to characterize properly what property was stolen, the defendant spends much of his brief advancing arguments that are ultimately irrelevant to deciding this appeal. Yet, even assuming for argument's sake that the the property stolen by the defendant a decade before was "cash," the district court was hardly precluded, as the defendant contends, from awarding an additional sum as restitution to compensate the victims for either the lost purchasing power of that cash or the lost opportunity cost of being unable to use that cash.

Even in circumstances where "cash" is stolen, the restitution statute permits recovery of more than just the cash originally stolen by allowing an award of prejudgment interest. *See United States v. Gordon*, 393 F.3d 1044, 1059 (9th Cir. 2004) (awarding prejudgment interest as part of restitution under the MVRA and stating "[p]rejudgment interest reflects the victim's loss due to his inability to use the money for a *productive* purpose, and is therefore necessary to make the victim whole") (internal quotation marks omitted); *United States v. Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (awarding prejudgment interest under the MVRA and stating "because the money

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[2] (...continued)
value are not available as a matter of law.

came from an interest-bearing account[,][r]estitution should include interest to make up for the loss of the funds' capacity to grow").[3] This Court has afforded a district court wide latitude in determining the value of stolen property. *Boccagna*, 450 F.3d at 114-15 (statute contemplates discretion by sentencing court and value deemed a "flexible concept"). It is entirely reasonable for the district court to calculate the present "value" at sentencing of cash stolen years ago to include a rate of return reflecting changes in purchasing power or the lost time value of money.

The defendant advances several arguments why, when solely cash is originally stolen (which is not this case), the district court should be precluded from awarding any additional recovery greater than the original dollars stolen. Each argument fails.

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[3] *Cf. United States v. Morgan*, 376 F.3d 1002,1014 (9th Cir. 2004) (awarding contractual prejudgment interest and finance charges under the VWPA); *United States v. Patty*, 992 F.2d 1045, 1050 (10th Cir. 1993) (permitting prejudgment interest under VWPA, as it is a component of the victim's loss and needed to make victim whole); *United States v. Smith*, 944 F.2d 618, 626 (9th Cir. 1991) (awarding prejudgment interest under the VWPA and stating "[f]oregone interest is one aspect of the victim's actual loss, and thus may be part of the victim's compensation"); *United States v. Rochester*, 898 F.2d 971, 982-83 (5th Cir. 1990) (awarding prejudgment and postjudgment interest under the VWPA and stating "the purpose of the VWPA would be served by the inclusion of interest in the judgment").

First, the defendant argues that prejudgment interest or lost investment earnings are not expressly mentioned in the restitution statute and thus should not be permitted under the rule of lenity. Def. Br. 11-16. The defendant is mistaken. As discussed above, failure to expressly mention a component of loss does not preclude its recovery under the restitution statutes. *See, e.g.*, *Milstein*, 481 F.3d at 136 (absence of express reference to lost income does not preclude recovery under reasonable interpretation of VWPA); *Gordon*, 393 F.3d at 1058 (awarding prejudgment interest even though "the MVRA is silent on the issue"); *Patty*, 992 F.2d at 1050 (holding that "silence in a statute as to prejudgment interest need not be interpreted 'as manifesting an unequivocal congressional purpose that the obligation shall not bear interest'" and thus awarding prejudgment interest under the VWPA) (quoting *Rodgers v United States*, 332 U.S. 371, 373 (1947)); *Smith*, 944 F.2d at 626 (absence of "language in the Act specifically allow[ing] or forbid[ding] prejudgment interest" does not preclude recovery under the VWPA).

Some rate of return is plainly appropriate to reflect the changed value of the stolen cash caused by the passage of time.[4] These courts award such interest because

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[4] The defendant attempts to draw significance from the fact that the restitution statute includes a provision for postjudgement interest. Def. Br. 18. The defendant suggests this illustrates that Congress chose not to include the availability of prejudgment interest. But Congress had no need to include prejudgment interest where the district court is (continued...)

"[p]rejudgment interest reflects the victim's loss due to his inability to use the money for a productive purpose and is therefore necessary to make the victim whole." *Gordon*, 393 F.3d at 1059.[5]

Advancing the argument against prejudgment interest, the defendant relies on two cases, neither of which addresses prejudgment interest under the MVRA or VWPA. *Rodgers v. United States*, 332 U.S. 371 (1947) (rejecting prejudgment interest under the Agricultural Adjustment Act, since goal of statute was to deter noncompliance with farm quotas, not to raise revenue); *United States v. Sleight*, 808 F.2d 1012, 1019 (3d Cir. 1987) (rejecting prejudgment interest under the Federal Probation Act on grounds that goal of making victim

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[4] (...continued)
already tasked with determining the stolen property's value at the date of sentencing.

[5] The defendant similarly contends that there is some significance that Congress expressly included a provision for lost income with bodily injury offenses under 18 U.S.C. § 3663A(b)(2)(C), but did not itemize such loss in stolen property offenses. This Court, however, has already found this argument unpersuasive in the virtually identical VWPA context. This Court explained that the defendant's argument "confuse[s] the loss of income suffered by a victim of personal injury with the very different notion of lost profits as a measure of loss suffered by a victim of misappropriation of property." *Milstein*, 481 F.3d at 136. "[N]othing in the text or legislative history of the VWPA precludes restitution for lost profits under section 3663(b)(1) where such losses amount to the 'value of the property' the victim lost." *Id.* at 136-37.

whole is only "one purpose" of that statute, and that it "remains inherently a criminal penalty"); *see also id.* at 1020 & n.4 (acknowledging that "the question is not free from doubt," and that one panel member disagreed with majority's holding).[6] Yet the primary purposes of the statutes in defendant's cited cases differ from the overriding purpose of restitution under the VWPA and MVRA, namely, making the victim whole. *See, e.g*, *Gordon*, 393 F.3d at 1058 n.13 (distinguishing *Sleight* and *Rico Industries* on the fact that the Federal Probation Act did not have making the victim whole as its "primary and overarching goal"); *Patty*, 992 F.2d at 1050 (distinguishing *Sleight* based on statutory purpose with same reasoning articulated in *Gordon*).

Third, the defendant mistakenly contends that awarding the victims restitution for the increase of the value of their mutual funds would impermissibly award "expectation damages," citing the Court's dicta in *Boccagna*, 450 F.3d at 119. "Expectation damages strive to place an 'aggrieved party in the same economic position it would have been in *had both parties fully performed' their contractual obligations*." *Id.* (emphasis added).[7] But

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[6] Defendant also cites *United States v. Rico Industries*, 854 F.2d 710 (5th Cir. 1988) (not awarding prejudgment interest under the Probation Act).

[7] By way of illustration: In a standard Ponzi scheme, the victim parts with cash (the stolen property) based on misrepresentations that the defendant will make the victims huge returns in the future. While the victim is not entitled (continued...)

here there was no fraudulent contract or expectations from a contract.[8] The victims in this case are solely seeking to be returned, to the extent they can in current dollars, to how they would have been had the thefts not taken place. Here, the victims did not part with their monies based on some contractual misrepresentation of expected large returns. Instead, the defendant simply stole the victims'

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[7] (...continued)
under the restitution statute to his pie-in-the-sky expectations being fulfilled, he is entitled to the present value of his stolen cash at sentencing, arguably the originally stolen cash plus an incremental recovery to reflect lost purchasing power or a conservative measure of lost opportunity cost.

[8] In *Boccagna*, HUD had guaranteed various mortgage loans extended to purchase properties for low income residents based on various misrepresentations by the borrowers. When the loans defaulted, HUD stepped in, repaid the outstanding loan balances, taxes, maintenance fees and other expenses and took over the properties in foreclosure. *Id.* at 110. HUD thus incurred an out-of-pocket loss of approximately $20 million. *Id.* The issue in that case was how to value the foreclosed properties as a credit against the monies expended by HUD. HUD limited any offset by valuing the properties based on the prices of its below-market sales to the New York City Department of Housing Preservation. HUD contended that using the nominal sale price would further the result it had *expected* in entering the original guarantee, namely, advancing affordable low income housing. *Id.* at 118-19. This Court rejected using a nominal value for the sales because such value did not reflect the higher fair market value of the housing or the true net economic harm caused to the victim by the fraudulent transactions. *Id.*

mutual funds and then lied to keep them in the dark. The district court properly determined the value of the stolen property – the retirement assets – as of the date of sentencing in order to return the victims to the place where they would have been if the defendant had not defrauded them of those assets. Such an award is simply compensating for "actual loss." *Boccagna*, 450 F.3d at 119.

The district court did not err in awarding restitution based on its valuation of the stolen property as of the date of sentencing.

3. To the extent that the victims are entitled to any recovery greater than the original cash value of the stolen mutual funds, the defendant waived any challenge to the methodology employed by the district court.

To the extent that the restitution statutes permit a restitution award in *any* amount greater than the original liquidation value of the stolen assets, the defendant waived any challenge to the district court's methodology for calculating lost investment returns.

In his supplemental submission, the defendant noted that, if restitution "beyond the funds actually taken is authorized and appropriate under 18 U.S.C. § 3663A, *the measure of lost investment gains (or losses) should be used* to calculate additional restitution . . . ." DA 133 (emphasis added). Moreover, the defendant agreed with the government as to total losses suffered if the lost-

investment-gains approach was adopted as the appropriate methodology, specifying total losses to be $471,962.88 to MassMutual (as substitute victim); $96,146 to Ms. DellaCamera; and $25,511 to Mr. DellaCamera.

The district court ultimately adopted the lost-investment-gains approach and the virtually identical numbers proposed by the parties. DA 10. The defendant plainly preferred this approach to the calculation of lost purchasing power based on a one-year treasury rate, also proposed by the government, because the aggregate award using the treasury rate would have been greater.

Where, as here, the defendant chooses for tactical reasons not to lodge an objection, he completely waives any claim of error on appeal. *See, e.g.*, *Olano*, 507 U.S. at 733*; Quinones*, 511 F.3d at 320-21; *Wellington*, 417 F.3d at 289-90**;** *Yu-Leung*, 51 F.3d at 1122; *Weiss*, 930 F.2d at 198; *Coonan*, 938 F.2d at 1561.

II. Any error by the the district court in failing to issue the restitution order within 90 days of sentencing was harmless, as acknowledged by the defendant.

On the date of sentencing, August 23, 2007, the district court ordered restitution of at least $290,913 to MassMutual, at least $90,198.62 to Elizabeth DellaCamera, and at least $25,511.36 to Charles DellaCamera, which reflected the original cash-out value

of the mutual funds embezzled by the defendant. DA 89.[9] The court indicated that it would consider the parties' supplemental briefing to determine whether additional restitution was appropriate. *Id.* The government filed its supplemental brief on September 11, 2007. DA 5. The defendant filed his supplemental brief on September 26, 2007. *Id.*

The court issued its written ruling on restitution on February 11, 2008. *Id.* The defendant seeks to void the restitution order – presumably to relieve his client from payment of any monies in excess of the original figures that were the subject of the oral restitution order at sentencing. He points out that the restitution statute, 18 U.S.C. § 3664(d)(5), provides that if a "victim's losses are not ascertainable by the date that is 10 days prior to sentencing, . . . the court shall set a date for the final determination of the victim's losses not to exceed 90 days after sentencing."

This Court has repeatedly held, however, that the purpose behind the statutory 90-day limit on the determination of victims' losses "is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of defendant['s] assets." *United*

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[9] The district court orally ordered a substantial portion of the restitution obligation at sentencing. It is thus unclear whether the 90-day rule was violated with respect to the lion's share of the restitution award. In any event, the timing of the entry of the final order has caused no prejudice to the defendant and thus any error is harmless under established precedent.

States v. Zakhary, 357 F.3d 186, 191 (2d Cir. 2004); *United States v. Catoggio*, 326 F.3d 323, 329-30 (2d Cir. 2003); *United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000). Extension of the proceeding beyond the 90-day period "provides no basis for vacating the restitution order unless the defendant can show that the extension caused him actual prejudice." *United States v. Douglas*, 525 F.3d 225, 252-53 (2d Cir. 2008).

The defendant has conceded that he has not been prejudiced by the delay in issuing the final restitution order. To the extent that the district court erred in delaying its ruling on restitution, such an error is harmless. *Zakhary*, 357 F.3d at 191; *Catoggio*, 326 F.3d at 329-30; *Stevens*, 211 F.3d at 5.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Dated: November 14, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

CHRISTOPHER SCHMEISSER
ASSISTANT UNITED STATES ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,121 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

CHRISTOPHER W. SCHMEISSER
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 3663A(b). Mandatory restitution to victims of certain crimes.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

18 U.S.C. § 3664(d)(5). Procedure for issuance and enforcement of order of restitution.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final

determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.